Supreme Court, U.S.
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IN THE

Supreme Court of the United States

NATIONAL ASSOCIATION OF BROADCASTERS,
Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION, *et al.*,
Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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PETITION FOR A WRIT OF CERTIORARI

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January 31, 2005

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

QUESTIONS PRESENTED

1. Whether the Federal Communications Commission's changes in the local radio ownership rules, leading to a substantial reduction in the number of local radio stations that may be commonly owned and transferred, violates Section 202 of the Telecommunications Act of 1996 by administratively repealing Congress's decision to dramatically deregulate media ownership rules and expand permissible common ownership.

2. Whether the Federal Communications Commission violated Section 202 of the Telecommunications Act of 1996 when it retained severe restrictions on local television ownership in all markets in the face of overwhelming evidence, acknowledged by the Commission, that common ownership in small and mid-sized local television markets will improve competition and advance the public interest.

PARTIES TO THE PROCEEDING

Pursuant to Rule 14.1(b), the following list identifies the parties to the proceeding in the court whose judgment is sought to be reviewed.

The petitioners below were Prometheus Radio Project, Media General, Inc., National Association of Broadcasters, Network Affiliated Stations Alliance, ABC Television Affiliates Association, CBS Television Affiliates Association and NBC Television Affiliates, Fox Entertainment Group, Inc. and Fox Television Stations, Inc., Viacom Inc., National Broadcasting Company, Inc., Telemundo Communications Group, Inc., Sinclair Broadcast Group, Inc., Media Alliance, Paxson Communications Corporation, National Council of the Churches of Christ in the United States, Tribune Company, Emmis Communications Corporation, Center for Digital Democracy and Fairness & Accuracy in Reporting, Clear Channel Communications, American Hispanic Owned Radio Association, Civil Rights Forum on Communications Policy, League of United Latin American Citizens, Minority Business Enterprise Legal Defense and Education Fund, Minority Media and Telecommunications Council, National Asian American Telecommunications Association, National Association of Latino Independent Producers, National Coalition of Hispanic Organizations, National Council of La Raza, National Hispanic Media Coalition, National Indian Telecommunications Institute, National Urban League, Native American Public Telecommunications, PRLDEF-Institute for Puerto Rican Policy, Unity: Journalists of Color, Inc., and Women's Institute for Freedom of the Press.

The respondents below were the Federal Communications Commission and the United States of America.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6, petitioner states that the National Association of Broadcasters has no parent company and issues no stock.

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William Fishman, *Comments on the FCC's Recent Mass Media Ownership Decision,* 53 Am. U. L. Rev. 583 (2004) 15-16

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OPINIONS BELOW

The opinion of the Court of Appeals is reported at 373 F.3d 372, and is reprinted at Pet. App. 1a-193a.[1] The Order of the Federal Communications Commission is reported at 18 F.C.C.R. 13,620 (the "*Order*"), and is reprinted at Pet. App. 206a-723a.

JURISDICTION

The Court of Appeals entered its judgment on June 24, 2004 and decided petitions for rehearing on September 3, 2004. On November 22, 2004, Justice Souter extended the time to file petitions for certiorari to January 3, 2005. On December 22, 2004, Justice Souter further extended the time to file petitions to January 31, 2005. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

This case involves provisions of the Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56. The pertinent provisions are reproduced at NAB Pet. App. 1a-5a.

STATEMENT OF THE CASE

This petition raises fundamental questions about the Federal Communications Commission's disregard of the commands of Congress with respect to the ownership of local radio and television stations. In Section 202 of the Telecommunications Act of 1996, Pub. L. No. 104-104, § 202, 110 Stat. 56 ("1996 Act"), Congress directed the FCC to relax some of its restrictions on common ownership of

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[1] In order to minimize the burdens on the Court and the parties, petitioner National Association of Broadcasters ("NAB") requested and received permission from the Supreme Court Clerk's office to cite to the appendix being filed in this case by petitioner Media General, Inc. Unless otherwise specifically indicated, all appendix cites in the petition are to the Media General appendix.

radio and television stations, and eliminate others altogether. Congress then mandated that the FCC continue this deregulatory agenda, ordering the FCC to review its media ownership regulations every two years and to "repeal or modify" those remaining regulations that were "no longer in the public interest." 1996 Act § 202(h).

Notwithstanding this directive from Congress, the United States Court of Appeals for the Third Circuit agreed with the FCC that Section 202 permits the FCC to adopt *more restrictive* rules for media ownership, even in the face of extensive findings confirming the significant benefits of common ownership. Indeed, in the Third Circuit's view, Section 202 provides no substantive constraint on the FCC's authority to limit common ownership, and the only function of Section 202(h) is to require the FCC "periodically to justify its existing regulations." Pet. App. 34a.

The Third Circuit's affirmance of the aspects of the FCC's *Order* challenged here cannot be squared with the deregulatory framework that Congress adopted in the 1996 Act, and will have severe consequences for local radio and television broadcasters. It is also in significant tension with decisions of the United States Court of Appeals for the District of Columbia Circuit. This Court's review is thus manifestly appropriate.

1. *The 1996 Act.* In the 1996 Act, Congress enacted a sea change in policy toward media ownership, choosing to place increased reliance on competition, rather than heavy-handed regulation, to promote the public interest. *See, e.g.*, *Reno v. ACLU*, 521 U.S. 844, 857-58 (1997) (explaining that the 1996 Act's "primary purpose was to reduce regulation" and thereby "promote competition in . . . the market for over-the-air broadcasting"); *see also, e.g.*, 1996 Act preamble; S. Rep. No. 104-23, at 1 (1995) (explaining that Congress intended to set up a "pro-competitive, de-regulatory, national policy framework"). Prior to the Act, the FCC had for

decades imposed restrictive regulations that sharply limited the number of media outlets – principally radio stations, television stations, and newspapers – that an entity could own in any local market, as well as the overall number of radio and television stations an entity could own nationwide.

The 1996 Act eliminated or relaxed virtually all of these media ownership rules. *See* 1996 Act § 202(a) (eliminating national radio station ownership cap); *id.* § 202(b) (relaxing local radio station ownership levels); *id.* § 202(c) (eliminating national television station ownership cap, increasing national audience reach limits, and ordering the Commission to take further action on local television ownership limits); *id.* § 202(d) (relaxing "one-to-a-market" cross-ownership rule); *id.* § 202(e) (relaxing dual television network ownership restrictions); *id.* § 202(f) (eliminating cable-broadcast cross-ownership restriction).

Section 202(h) was a critical part of Congress's effort to change the regulatory paradigm. In that provision, Congress directed the Commission to undertake a biennial review to determine, on an ongoing basis, whether to "repeal or modify" regulations still further in light of media competition. *Id.* § 202(h); *see also* Consolidated Appropriations Act, Pub. L. No. 108-199, § 629, 118 Stat. 3, 99-100 (2004) (amending Section 202(h) to require quadrennial rather than biennial review). In particular, Section 202(h) requires the Commission to "determine whether any of [its ownership rules] are necessary in the public interest in light of competition," and to "repeal or modify any regulation it determines to be no longer in the public interest." 1996 Act § 202(h).

2. *Local radio rules.* In its 2002 biennial review, the Commission changed the way it defined local radio markets, and in so doing effectively reduced permissible common ownership of local radio stations below the levels set in the 1996 Act.

Historically, the FCC had sharply constrained the right of a single entity to own multiple radio stations, both nationally and within local markets. The Commission first limited local ownership of AM radio stations in the 1930s, and, after the development of FM, restricted common ownership to one AM station and one FM station in a single local market. *See In re Rules & Policies Concerning Multiple Ownership of Radio Broadcast Stations in Local Markets*, 16 F.C.C.R. 19,861, ¶¶ 3-11 (2001) ("*Multiple Ownership Order*"). This restriction remained in place until 1992, when the Commission relaxed it slightly, permitting common ownership of no more than three stations in local markets with fourteen stations or fewer, and no more than four stations in larger markets; in no event could more than two of the commonly owned stations be either AM or FM. *See* 47 C.F.R. § 73.3555(a) (1995).[2]

Because these ownership restrictions applied to local "radio markets," the method used for defining those markets effectively dictated the scope of the restriction. For decades, the Commission used a "contour" approach to define local radio markets based on listeners' ability to receive stations' signals. *See Multiple Ownership Order* ¶¶ 3-11. Local markets were defined with reference to stations' "principal community contour" – essentially, the area reached by a station's signal at a certain level of strength. *See* 47 C.F.R. § 73.3555(a)(3) (1995).[3] For each proposed combination of

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[2] The description of the 1992 rule revision contained in the Third Circuit's opinion below is inaccurate; the numerical tiers that the Third Circuit sets forth were never put into effect. *See* Pet. App. 82a-83a n.60 (citing 57 Fed. Reg. at 18,090); 57 Fed. Reg. 35,763-01 (1992); 57 Fed. Reg. 42,701-01 (1992) (explaining that "[t]his Memorandum Opinion and Order modifies rules adopted in Report and Order in MM Docket No. 91-140, 7 FCC Rcd 2755 (1992), 57 FR 18089 (April 29, 1992)").

[3] The Commission adopted the "principal community contour" approach in 1989, and had previously used a similar signal-based approach based

stations, the local market consisted of "the number of . . . stations whose principal community contours overlap, in whole or in part, with the principal community contours of the stations" that were proposed to be commonly owned. *Id.* In other words, a market consisted of stations whose signals reached the same listeners reached by one or more of the stations whose ownership was at issue.

The Commission reaffirmed this approach in 1992 and again in 1994. These orders rejected the notion that markets should be defined purely in terms of geography – *e.g.*, defining all of an urban area such as Philadelphia or Seattle as a local market regardless of the actual reach of the signals of radio stations based in those locales. *See In re Revision of Radio Rules & Policies*, 7 F.C.C.R. 6387, ¶¶ 39-40 (1992) ("*1992 Radio Order*"); *In re Revision of Radio Rules & Policies*, 9 F.C.C.R. 7183, ¶ 35 (1994) ("*1994 Radio Order*"). The Commission explained that a contour overlap approach provides "a more accurate measure of where a station's signal can be adequately received and, therefore, where [the station] can compete for listeners." *1994 Radio Order* ¶ 35.

It was against this backdrop that Congress passed the 1996 Act, which significantly relaxed the FCC's numerical limits on local radio ownership and permitted additional combinations in each "radio market." Under the Act, a party that could previously have owned no more than four stations in a large market could now own as many as eight. Specifically, Section 202(b) of the 1996 Act states that:

> The Commission shall revise section 73.3555(a) of its regulations . . . to provide that –
>
> (A) in a radio market with 45 or more commercial radio stations, a party may own, operate, or control up

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on the overlap of stations' "interference contours." *Order* ¶ 235 n.498 (Pet. App. 367a).

> to 8 commercial radio stations, not more than 5 of which are in the same service (AM or FM);
>
> (B) in a radio market with between 30 and 44 (inclusive) commercial radio stations, a party may own, operate, or control up to 7 commercial radio stations, not more than 4 of which are in the same service (AM or FM);
>
> (C) in a radio market with between 15 and 29 (inclusive) commercial radio stations, a party may own, operate, or control up to 6 commercial radio stations, not more than 4 of which are in the same service (AM or FM); and
>
> (D) in a radio market with 14 or fewer commercial radio stations, a party may own, operate, or control up to 5 commercial radio stations, not more than 3 of which are in the same service (AM or FM), except that a party may not own, operate, or control more than 50 percent of the stations in such market.

1996 Act § 202(b); *see also In re Implementation of Sections 202(a) & 202(b)(1) of the Telecommunications Act of 1996*, 11 F.C.C.R. 12,368, ¶¶ 4, 5 (1996) (revising the regulation per the statutory instruction). In putting these specific numerical limits into place, Congress did not change in any way – and, indeed, relied upon – the FCC's existing definition of "radio market," which was also set forth in 47 C.F.R. § 73.3555(a).

Congress did not make these limits immutable, but authorized changes under only two circumstances. First, the Commission may permit a person or entity to own *additional* radio broadcast stations "if the Commission determines that such ownership . . . will result in an increase in the number of radio broadcast stations in operation." 1996 Act § 202(b). Second, the Commission must scrutinize its ownership rules periodically as part of the review required by Section 202(h).

Expressing concern that the 1996 Act resulted in too much concentration, the FCC initiated a proceeding in 2000 to change the definition of local radio markets. *See In re Definition of Radio Markets*, 15 F.C.C.R. 25,077, ¶¶ 5-7 (2000); *id.* at 25,097-98 (separate statement of Commissioner Gloria Tristani); *In re 1998 Biennial Regulatory Review*, 15 F.C.C.R. 11,058, 11,087-91 (2000). The Commission thus threatened to do indirectly what it could not do directly – to limit common ownership in local radio markets to levels below those set by Congress. Indeed, at the time, individual Commissioners warned that the FCC was seeking "to change our definition of 'markets' in order to cut back on the concentration levels that Congress expressly set." 15 F.C.C.R. at 25,099 (separate statement of Commissioner Furchtgott-Roth); *accord id.* at 25,100 (separate statement of Commissioner Powell).

In the *Order* under review here, the FCC ignored that warning. The Commission acknowledged that radio stations had previously suffered serious financial difficulties, due in large part to their "inability . . . to seek efficiencies through consolidation." *Order* ¶¶ 292-293 (Pet. App. 406a-407a). It also recognized that the increased common ownership resulting from Congress's relaxation of the ownership rules put the "radio industry . . . on a stronger financial footing" and created "financial stability," enabling stations to better serve their listeners. *Id.* ¶¶ 235-236, 292-293 (Pet. App. 367a-368a, 406a-407a). The Commission nevertheless abandoned the longstanding contour-based approach that had defined "radio market[s]" when Congress used the phrase in Section 202(b) of the 1996 Act, and adopted instead a more restrictive, geography-based market definition.

The Commission's new market definition relies entirely on data provided by Arbitron, a commercial ratings service that for some areas of the country assembles survey data on radio listenership and groups stations geographically. *See,*

e.g., *id.* ¶¶ 275-276 (Pet. App. 391a-393a). Under Arbitron's approach, stations that do not compete for listeners, because their signal contours do not overlap, are often placed within the same geographic market.[4]

It is undisputed that the Commission's new approach to market definition results in the inclusion of fewer stations in a market, which in turn results in stricter ownership limits than Congress contemplated in Section 202 of the 1996 Act. *See, e.g.*, Pet. App. 148a-149a; *see also Order* ¶¶ 483, 486 ("We recognize that a geographic based radio market definition may result in a fewer number of stations in certain markets.") (Pet. App. 539a, 541a-542a); *Radio Markets Definition*, 15 F.C.C.R. at 25,100 (concurring statement of Commissioner Powell); Br. of FCC at 20 (3d Cir. filed Dec. 9, 2003) (conceding that the *Order* "tightened existing rules" in the local radio context).

The Commission exacerbated the impact of its market redefinition by applying it to existing station combinations, not merely future ones. The Commission grandfathered existing groups of commonly owned radio stations that would otherwise exceed the ownership limits in light of the newly defined markets but only so long as those groups did not change hands. *Order* ¶ 484 (Pet. App. 539a-541a). Such

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[4] An Arbitron "Metro" market consists of a particular county or set of counties with a boundary determined by Arbitron. As redefined by the Commission, a local radio market in an area rated by Arbitron now includes commercial and non-commercial stations that are licensed to a community within the relevant "Metro." Under the FCC's revised rules, a local radio market also includes stations located outside the Metro that attract a minimum level of listenership in the Metro and elect to be designated as "home" to the Metro. *See id.* ¶¶ 275, 277 & n.582, 279-281, 295 (Pet. App. 391a-398a, 408a-409a).

The FCC initiated a new proceeding to consider how to treat the areas not rated by Arbitron and elected in the interim to use a slightly modified version of the signal contour approach for those areas. *See id.* ¶¶ 282-286 (Pet. App. 398a-401a).

grandfathered groups of stations must be broken up to comply with the new ownership limits if they are sold or transferred. *Id.* ¶ 487 (Pet. App. 542a-544a).

Of a similar effect is the Commission's decision to count radio stations with Joint Sales Agreements ("JSAs"), which involve the joint sale of some advertising time, toward the number of stations the brokering licensee may own in a local market. *Id.* ¶¶ 316-325 (Pet. App. 422a-429a). Attribution of JSAs does not shrink the number of stations counted in a market, but it can increase the number of stations that a particular party is deemed to own, thus limiting the party's right to acquire additional stations under the applicable ownership limits.

The Commission asserted that all these new restrictions on local radio market combinations comported with Section 202. The Commission stated that "Section 202(b) contemplated that we would exercise our rulemaking authority to make revisions to the rule that Congress required," because even if "Congress intended Section 202(b) as a statement of the radio station ownership levels that would be conclusively consistent with the public interest," Congress did not "intend[] that statement to remain true in perpetuity." *Id.* ¶¶ 265-267 (Pet. App. 385a-387a). The Commission also concluded that its actions were consistent with Section 202(h). In the FCC's view, Section 202(h) simply "shift[s] the traditional administrative law burden from those seeking to modify or eliminate the rule to those seeking to retain it," *id.* ¶ 269 (Pet. App. 387a-388a), but does not (either alone or in conjunction with the rest of Section 202) limit "the types of changes that [the agency] may conclude are in the public interest," *id.*

3. *Local television rules.* The Commission's *Order* also modified the FCC's local television ownership rules. In 1964, the Commission adopted a "TV Duopoly Rule" that prohibited common ownership or control of local television

stations with overlapping signal contours. In subsequent decades, however, dramatic market changes eroded the competitive and financial position of local television broadcasters. Thus, in the 1996 Act, Congress directed the FCC to "conduct a rulemaking proceeding to determine whether to retain, modify, or eliminate its limitations on the number of television stations that a person or entity may own, operate, or control . . . within the same television market." 1996 Act § 202(c); *see also id.* (eliminating nationwide cap on common ownership of television stations and increasing national audience reach limit); H.R. Rep. No. 104-204 at 118 (1995) ("H. Rep.") (explaining that competitive changes in local markets "require substantial deregulation of the local television ownership rules" and that "[p]ermitting common ownership of stations will promote the public interest"). The FCC's local television rules were also made subject to review under § 202(h). *See supra* page 3.

Despite Congress's directives, the Commission in 1999 only slightly loosened the TV Duopoly Rule, *see Order* ¶ 132 (Pet. App. 389a), permitting common ownership of two television stations in the same local market where one of the stations was not among the four highest ranked stations in the market and "eight independently owned and operating full-power broadcast . . . television stations" remained in the market post-merger. *Id.* After review, the D.C. Circuit remanded this rule, explaining that "Section 202(h) carries with it a presumption in favor of repealing or modifying the ownership rules" and was "designed to continue the process of deregulation." *Sinclair Broad. Group, Inc. v. FCC*, 284 F.3d 148, 159 (D.C. Cir. 2002) (internal quotation marks omitted). In particular, the D.C. Circuit concluded that the Commission had failed to account for actual conditions in local markets because it had ignored the impact of cable and other media. *See id.* at 162-65.

On remand, the FCC undertook a detailed examination of local markets, and found that local television broadcasters "face intense competitive pressure from alternative video programming" such as cable and direct broadcast satellite. *Order* ¶ 125 (Pet. App. 286a). The Commission also found that increased competition, as well as the costs of a congressionally mandated transition to digital television, had placed severe financial pressures on broadcasters, particularly in small and medium-sized markets. *See id.* ¶ 201 (explaining that "data confirm that the ability of local stations to compete successfully in the delivered video market is meaningfully (and negatively) affected in mid-sized and smaller markets") (Pet. App. 344a).

Based on this record, the Commission concluded that co-ownership of these beleaguered stations would ease financial burdens and result in substantial benefits to viewers. The Commission found that "common ownership of broadcast television stations in a local market can facilitate efficiencies and cost savings," *id.* ¶ 147 (Pet. App. 300a-301a); that the existing rule "restrict[ed] many broadcasters to suboptimal size and, therefore, hinder[ed] their ability to compete with other media for advertising revenue," *id.* ¶ 151 (Pet. App. 303a); that common ownership generally "improved audience ratings" since viewers generally "prefer the post-merger programming," *id.* ¶ 150 (Pet. App. 302a-303a); that common ownership enables stations to increase local and public affairs programming, *id.* ¶ 164 (Pet. App. 316a); and that there is "a positive correlation between same-market combinations and the offering of local news," *id.* ¶ 169 (Pet. App. 320a).

In light of these well-supported findings, the Commission modestly relaxed the local television ownership rules. Under the *Order*, two stations may be commonly owned in markets with 17 or fewer stations; in markets with

18 or more stations, common ownership of up to three stations is permitted. *See id.* ¶ 134 (Pet. App. 290a-291a).

But the Commission also adopted a rule that negated most of the deregulatory benefits of these changes. Specifically, the Commission prohibited common ownership of two stations ranked among the top 4 in audience share in any local market. Thus, despite expressly finding that "owners of television stations in small and mid-sized markets are experiencing greater competitive difficulty than stations in larger markets," *id.* ¶ 201 (Pet. App. 343a-344a), the FCC adopted a rule that, in the 150 smallest markets (of the 210 markets nationwide), allows no combinations at all in 81 markets, and only one combination in 35 more. The Commission recognized that its "top-4 rule" thereby "disserve[s] the public interest by preventing marginal – but not yet 'failing' – stations from effectively serving the needs of their communities." *Id.* ¶ 227 (Pet. App. 362a-363a). The Commission's only solution was to state that it would consider applications to waive the top-4 rule on a case-by-case basis. *See id.* ¶¶ 227-230 (Pet. App. 362a-365a).

4. *Proceedings in the Third Circuit.* Judicial review of the *Order* was assigned by lottery to the Third Circuit. *See* 28 U.S.C. § 2112(a); *see also id.* § 2342(1) (giving "exclusive jurisdiction . . . to determine the validity" of FCC orders to the federal courts of appeals on direct review). The Third Circuit first stayed implementation of the *Order*, *see* Pet. App. 194a-196a, and then (over a dissent by Chief Judge Scirica) denied a motion to transfer venue to the D.C. Circuit, which had previously remanded the local and national television ownership rules for the reconsideration that the Commission ultimately carried out in the *Order*. *See id.* at 197a-205a; *see also Fox Television Stations, Inc. v. FCC*, 280 F.3d 1027 (D.C. Cir.), *modified on reh'g*, 293 F.3d 537 (D.C. Cir. 2002); *Sinclair Broad. Group Inc. v. FCC*, 284 F.3d 148 (D.C. Cir. 2002).

On June 24, 2004, the Third Circuit issued its decision on the merits. The court interpreted Section 202(h) to give the Commission wide discretion in carrying out its review of the ownership rules. In particular, despite acknowledging that Section 202(h) was intended to be "deregulatory," the court of appeals drained that term of all meaning. In the Third Circuit's view, Section 202(h) simply requires the Commission to "justify its existing regulations," so that a "regulation deemed useful when promulgated must remain so," and "[i]f not, . . . must be vacated or modified." Pet. App. 34a. The Third Circuit thus rejected arguments that Section 202(h) – read in light of Section 202 as a whole – put any "thumb on the scale" in favor of deregulation, and held that Congress did not "intend[] to restrict the Commission's rulemaking authority." *Id.* at 34a n.18. In the Third Circuit's view, other than the obligation for periodic justification, the Commission retained full flexibility to impose new, more stringent media ownership regulations – including the power to restore the restrictions Congress had expressly overturned – so long as the Commission believed that such regulations were reasonable. *See id.* at 34a.

In light of this interpretation, the Third Circuit upheld the aspects of the Commission's local radio and local television rules that are the subject of this petition. With respect to local radio, the court recognized that "the change to Arbitron Metro markets operates as a net decrease in most markets' size," *id.* at 91a, and therefore as a reduction in the number of radio stations permitted to be commonly owned. The court of appeals held, however, that under Section 202 "[t]he Commission is free to regulate or deregulate as long as its regulations are in the public interest and are supported by a reasoned analysis," and it concluded that "[t]he change to Arbitron Metro markets is both." *Id.* at 85a.

The court rejected NAB's argument that Congress's express directive in Section 202(b) for the Commission to set

specific ownership levels for "radio markets" of particular size, in conjunction with Section 202(h)'s deregulatory mandate, precluded the Commission from effectively reducing the levels of common ownership below those set by Congress. The Third Circuit found it sufficient that the Commission reasonably concluded that the Arbitron methodology was preferable to a contour-based methodology (despite the fact that the Commission had twice in the four years prior to the 1996 Act expressly rejected that very conclusion). The court likewise upheld the Commission's decision to attribute JSAs, *see supra* page 9, even though this decision represented a change in course and was contrary to congressional intent, concluding that the decision was reasoned and did not raise constitutional problems. *See* Pet. App. 96a-98a; *see also* H. Rep. at 118 (stating that legislation did not change FCC's method of "attributing ownership" and did not "envision" the FCC doing so); *In re Review of the Commission's Regulations Governing Attribution of Broadcast & Cable/MDS Interests*, 14 F.C.C.R. 12,559 (1999) (specifically declining to require attribution of JSAs).

The Third Circuit employed a similar analysis to uphold the Commission's decision not to grandfather existing radio station combinations if they were sold. The court approved of the requirement to break up certain station groups when sold, despite the fact that it was concededly not deregulatory, finding it rational. *See* Pet. App. 91a-93a.

With respect to local television, the court upheld the restriction on combinations among top-4 stations. The court agreed that there was ample evidence of the benefits of common ownership for local television stations and their viewers, including "improved local news and public interest programming." *Id.* at 71a. Giving no substantive effect to Section 202(h), however, the court concluded that the Commission's top-4 local television rule, adopted on remand from the D.C. Circuit, was permissible. The court stated that

"the Commission's local television rule" is not unreasonable given that "the detriment of concentrated market power" might outweigh the "efficiency benefits" of consolidation. *Id.* at 73a-74a. The court also decided to "extend deference" to the Commission's "restriction on combinations among the top-four stations as opposed to the top-three or some other number." *Id.* at 75a.

The Third Circuit initially continued its stay of the Commission's rules pending the Commission's further action on the aspects of the *Order* that the court remanded. *See id.* at 107a. However, in response to the FCC's petition for rehearing, the court lifted its stay as to the implementation of the changes to the local radio rules that the court had approved. *See id.* at 193a. Accordingly, these changes have now gone into effect.

REASONS FOR GRANTING THE PETITION

In this case, the Third Circuit endorsed the FCC's decision to re-regulate local radio markets to levels that Congress found too restrictive in 1996, and to deny the undisputed benefits of deregulation and common ownership to local television broadcasters in small and medium-sized markets. This Court should grant review because the FCC has refused to implement the clear commands set forth in Section 202 of the 1996 Act, the FCC's actions will undeniably harm the vitally important local broadcast industry, and the Third Circuit's decision upholding the FCC is in significant tension with the D.C. Circuit's interpretation of Section 202.

I. This Case Raises Critically Important Questions About The FCC's Disregard Of Congressional Commands In The 1996 Act As To The Ownership Of Local Radio And Local Television Stations.

The Commission's review of its media ownership rules is "one of the most important [determinations] in the FCC's

history." William Fishman, *Comments on the FCC's Recent Mass Media Ownership Decision*, 53 Am. U. L. Rev. 583, 583 (2004). As part of this review, the Commission adopted a restrictive change in the definition of local radio markets and a "top-4" limitation on the common ownership of local television stations. These rules, upheld by the Third Circuit, involve one of the FCC's key regulatory missions and are undeniably of national concern. They also dramatically affect the financial future of local broadcasters and, indeed, the future development of local broadcasting itself.

This Court has recognized that the 1996 Act was "an unusually important legislative enactment," *Reno v. ACLU*, 521 U.S. at 857, and has previously decided a number of questions arising out of the FCC's implementation of the Act. *See, e.g., AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366 (1999) (reversing a decision of the Eighth Circuit with respect to the 1996 Act that would have interfered with the Act's goal of increasing competition); *Verizon Communications, Inc. v. FCC*, 535 U.S. 467 (2002) (interpreting the 1996 Act's provisions regarding telecommunications rate-setting methodology).

The questions presented here are of similar importance. Like the telecommunications provisions of the 1996 Act, the media ownership provisions govern the management of valuable spectrum and "profoundly affect[] a crucial segment of the economy worth tens of billions of dollars." *AT&T Corp.*, 525 U.S. at 397; *see also* Pet. App. 150a (noting that "[i]n each of the last six years, about 20% of U.S. radio stations have changed hands"). Each year, radio and television broadcast stations earn approximately $40 billion in local advertising revenue.

Moreover, in recognition of the importance of properly construing FCC authority in this area, this Court has frequently granted certiorari to review cases involving the FCC's media regulations – including its ownership rules –

even in the absence of a Circuit split. *See, e.g., FCC v. National Citizens Comm. for Broad.*, 436 U.S. 775 (1978) (granting certiorari to review FCC regulations governing permissibility of common ownership of radio or television broadcast station and daily newspaper); *United States v. Storer Broad. Co.*, 351 U.S. 192 (1956) (granting certiorari to review FCC's multiple ownership rules for broadcast stations); *see also, e.g., Metro Broad., Inc. v. FCC*, 497 U.S. 547 (1990) (granting certiorari to review FCC policies encouraging minority ownership of broadcast stations); *CBS, Inc. v. FCC*, 453 U.S. 367, 371 (1981) (granting certiorari "to consider whether the Federal Communications Commission properly construed" a statute governing broadcast rules); *FCC v. WNCN Listeners Guild*, 450 U.S. 582 (1981) (granting certiorari to review FCC policy statement regarding public interest in competition among broadcasters); *FCC v. Allentown Broad. Corp.*, 349 U.S. 358, 360 (1955) (granting certiorari on question relating to radio stations "[i]n view of the importance to the administration of the [Communications] Act"); *FCC v. Sanders Bros. Radio Station*, 309 U.S. 470 (1940) (same).

Because the Third Circuit was selected to review all challenges to the FCC's revised media ownership rules, *see* 28 U.S.C. § 2112(a), its decision has nationwide effect. *See id.* § 2342(1). If, as the Third Circuit has held, the FCC may construe Section 202 to permit an increase in the regulatory burdens on local radio and local television stations, then the 1996 Act's reform of the local ownership rules will be severely compromised. Further, the many beneficial effects of common ownership – which Congress instructed the Commission to attain – will not be realized.

The impact on local broadcasters is harsh. As the FCC itself conceded, "[a]s a result of th[e] consolidation [provided by the 1996 Act], the radio industry today is on a stronger financial footing than it was a decade ago." *Order* ¶ 236

(Pet. App. 368a); *see also id.* ¶¶ 235-236, 292-293 (Pet. App. 367a-369a, 406a-407a). By approving the FCC's cut-back of the very deregulatory measures that permitted this financial recovery, the Third Circuit's decision threatens to undo that progress. As the Commission has previously explained, the radio "industry's ability to function in the 'public interest, convenience, and necessity' is fundamentally premised on its economic viability." *In re Revision of Radio Rules & Policies*, 7 F.C.C.R. 2755, ¶¶ 2, 7-11 (1992). The FCC's market redefinition (and other rule changes) restricts the ability of struggling stations to attain the efficiencies of common ownership. Further, the FCC's tightening of ownership restrictions on local radio puts radio broadcasters at a competitive disadvantage with respect to all other electronic and print media with which they compete for advertising revenue and audience share.

Moreover, although the FCC conceded that local television broadcasters in small and medium-sized markets face severe financial pressures and that these pressures are eased by joint ownership, the new rules prevent the common ownership that offers these local broadcasters the hope of fiscal stability. Rules preventing local stations from forming more efficient ownership patterns consequently jeopardize the ability of stations to transition successfully to digital broadcasting, an important national policy. *See* 47 U.S.C. §§ 309(j)(14), 336, 337. The new rules will also seriously affect television viewers, who receive benefits from common ownership – including more local news, other local information, and improved programming overall – via the airwaves. *See* Pet. App. 71a (holding that common ownership has major advantages such as "improved local news and public interest programming"); *Order* ¶ 150 (Pet. App. 302a-303a) (concluding based on empirical study of existing local station combinations that permitting further common ownership would "likely result in the delivery of programming preferred by viewers"); *see also, e.g., Turner*

Broad. Sys., Inc. v. FCC, 520 U.S. 180, 189-90 (1997) (recognizing importance of "preserving the benefits of free, over-the-air local broadcast television").

The Third Circuit's affirmance of the Commission's local radio and television ownership rules will therefore have profound implications for the nature and quality of news, local affairs, and other programming offered to the listening and viewing public, as well as for the very survival of radio and television broadcasters across the country. The questions presented here are thus worthy of review in this Court.

II. The Local Radio Market Redefinition Upheld By The Third Circuit Violates Section 202 Of The 1996 Act And Contravenes Congress's Deregulatory Intent.

In affirming the FCC's replacement of the longstanding contour approach to local radio market definition with a geographic approach, as well as the Commission's refusal to grandfather under all circumstances existing combinations that run afoul of the new market definition, the Third Circuit permitted the FCC to tighten the limits on local station ownership established by Congress in the 1996 Act. The Third Circuit's decision to allow this increased restriction on ownership cannot be squared with Congress's express efforts to expand the level of allowable radio ownership and with the clear deregulatory thrust of Section 202, which the D.C. Circuit has previously interpreted. *See generally Chevron U.S.A., Inc. v. Natural Resource Defense Council, Inc.*, 467 U.S. 837, 842-43 (1986).

1. As noted, in Section 202, Congress redirected the Nation's media ownership policy, choosing to place increased reliance on competition rather than heavy-handed regulation to promote the public interest. *See supra* page 2. Section 202 thus dramatically overhauled the FCC's restrictive ownership regulations and put in place a mechanism for further deregulation.

Section 202(b) expressly addressed local radio ownership and rejected the overly tight constraints that the Commission then had in place. In the largest markets, for example, where previously no more than four stations could be commonly owned, Congress permitted common ownership of up to eight stations. *See* 1996 Act § 202(a), (b). These provisions, in conjunction with Section 202(h), were intended to permit more station combinations and give much-needed financial stability to struggling radio stations. *See* 141 Cong. Rec. S8424 (daily ed. June 15, 1995) (remarks of Sen. Burns) (stating that "[i]ncreased multiple ownership opportunities w[ould] allow radio operators to obtain efficiencies"); *id.* at S8431 (remarks of Sen. Pressler) (explaining that benefits of multiple ownership were necessary to allow radio to "grow strong [and] well into the next century").

2. The Commission's decision to change its longstanding radio market definition, upheld by the Third Circuit without serious scrutiny, overrides Congress's decision to set with extraordinary specificity the permissible levels of common ownership. *See supra* pages 5-6 (setting out ownership tiers). Congress's specification of a particular level of ownership in a "radio market," 1996 Act § 202(b), makes sense only in the context of a particular definition of that market – and the operative definition in 1996 was the contour approach. Congress is presumed to have been aware of the FCC's long history of using contour-based markets, as well as of the FCC's reaffirmation of that approach and its specific rejection of Arbitron in 1992 and 1994. *See 1992 Radio Order* ¶¶ 39-40 (concluding that station counts "will be made with reference to a contour overlap standard in all situations"); *1994 Radio Order* ¶ 35; *see also, e.g.*, *Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 846 (1986); *Lorillard v. Pons*, 434 U.S. 575, 580-82 (1978).

Indeed, this presumption, which the Third Circuit failed even to address, is amply justified here. Congress expressly referenced "radio market[s]" in the 1996 Act, directed the Commission to amend other portions of the particular regulatory *subsection* in which the contour-based definition was located, and defined in great detail ownership limits that depended critically on how markets would be defined. *See* 1996 Act § 202(b); 47 C.F.R. § 73.3555(a) (1995). The contour-based approach is thus embedded in Congress's choice of numbers; if radio markets had been defined differently, Congress would have made a different judgment.[5] *Cf. Sinclair*, 284 F.3d at 162 ("There is an obvious interrelatedness between the Commission's choice of eight [voices] and its definition of 'voices.'").

The Third Circuit's disregard for Congress's carefully calibrated judgment was only compounded by the court's approval of the Commission's grandfathering rules. These rules effectively cut back on the permitted level of common ownership retroactively, by using the stringent new market definition to prevent the transfer of station combinations properly formed in good faith reliance on the 1996 Act.

Likewise, the Commission's decision to attribute JSAs toward the number of stations a party could own in a particular local market further restricted the permissible level of common ownership. Stations that previously did not

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[5] The Third Circuit applied this very presumption elsewhere in the *Order*, but inexplicably failed to apply it in the radio context. With respect to the "UHF discount," the court of appeals noted that "Congress instructed the Commission to 'increase the national audience reach limitation for television stations to 39%,'" and that "[s]ince 1985 the Commission has defined 'national audience reach'" to include the discount. Pet. App. 37a. The court concluded that "when Congress uses an administratively defined term, it intended its words to have the defined meaning." *Id.* It further concluded that "reducing or eliminating the discount for UHF station audiences would effectively raise the audience reach limit" and "undermine Congress's specification of a precise 39% cap." *Id.*

"count" towards the ownership limits are, as a result of the FCC's ruling, suddenly considered to be part of a commonly owned group.

3. Nothing in Section 202 validates the Third Circuit's decision to allow the FCC to ride roughshod over Congress's judgment. To the contrary, Sections 202(b) and 202(h) together express a clear directive that local ownership restrictions not be tightened.

Section 202(h) is preceded by six subsections that relaxed or extinguished then-existing FCC limits, making clear that Section 202(h) was designed to ensure continued deregulation. *See, e.g., FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000) (words of a statute "must be read . . . with a view to their place in the overall statutory scheme" (internal quotation marks omitted)); *Reves v. Ernst & Young*, 494 U.S. 56, 63 (1990) (statutory language must be interpreted against "the backdrop of what Congress was attempting to accomplish"); *see also* H. Rep. at 118 (explaining that Congress assumed the FCC would not change its "current methodology of calculating or attributing ownership" so as to "impede the objectives" of the Act).

The D.C. Circuit read Section 202 in precisely that way. In *Fox*, the court stated that "[i]n the [1996 Act] the Congress set in motion a process to deregulate the structure of the broadcast and cable television industries," and that Section 202(h) was intended "to continue the process of deregulation." 280 F.3d at 1033. The court also explained that "the mandate of § 202(h) might . . . be likened to Farragut's order at the battle of Mobile Bay ('Damn the torpedoes! Full speed ahead.')." *Id.* at 1044. Similarly, in *Sinclair Broadcast Group, Inc. v. FCC*, 284 F.3d 148 (D.C. Cir. 2002), the D.C. Circuit reiterated that "Section 202(h) carries with it a presumption in favor of repealing or modifying the ownership rules," and was "designed to

continue the process of deregulation." *Id.* at 159 (internal quotation marks omitted).[6]

As the D.C. Circuit recognized, Section 202(h), read in conjunction with the remainder of Section 202, permits the Commission to relax or maintain existing regulations, but not to impose more stringent regulations that would undo the decisions Congress made. *Cf. 2000 Biennial Regulatory Review*, 16 F.C.C.R. 1207, ¶ 19 (2001) ("[A]s a part of the biennial review process, we do not intend to impose new obligations on parties in lieu of current ones, unless we are persuaded that the former are less burdensome than the latter and are necessary to protect the public interest."); *FCC 2002 Biennial Regulatory Review*, 18 F.C.C.R. 4243, 4279 (2002) (stating that to "add or expand" regulations, "as opposed to modifying or eliminating existing rules," is "beyond the scope" of the Commission's periodic review).

The Third Circuit grounded its contrary interpretation in Section 202(h)'s use of the term "modify" in the phrase "repeal or modify." *See* Pet App. 33a-34a. But "modify" in "repeal or modify" means, as it does throughout Section 202, that the Commission can *relax* existing restrictions; it does not authorize the Commission to tighten them, particularly when doing so would eviscerate the specific directives

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[6] The D.C. Circuit addressed related but nevertheless distinct issues in *Cellco Partnership v. FCC*, 357 F.3d 88 (D.C. Cir. 2004). *Cellco* involved a provision of the 1996 Act similar, but not identical, to Section 202(h): Section 11, 47 U.S.C. § 161. The *Cellco* court focused on the specific meaning of the term "necessary" in Section 11, and decided that the term did not mean "indispensable." *Cellco*, 357 F.3d at 97-98. In *Fox*, the panel had reached a contrary conclusion with respect to the term "necessary" in Section 202(h), but had eliminated that aspect of its opinion on rehearing. *Cellco* did not consider – because it was not relevant to Section 11 – how the remainder of Section 202 affects the proper interpretation of Section 202(h), or whether Section 202(h) permits the imposition of regulations that are more restrictive than those imposed expressly by Congress as part of the 1996 Act.

Congress gave in Section 202(b) as to the permissible level of multiple ownership.[7]

In support of its view of the meaning of Section 202(h), the Third Circuit also pointed to the requirement that the Commission act "in the public interest." But Section 202(h) does not impose an abstract – and entirely superfluous – public interest requirement. Rather, it channels the Commission's public interest review in a particular direction, instructing the Commission to determine whether its ownership rules are "necessary in the public interest *as the result of competition*," and "*repeal or modify* any regulation it determines to be *no longer in* the public interest." 1996 Act § 202(h) (emphasis added). Congress's specific instructions in Section 202 obviously limit how the Commission's general authority can be exercised "[]consistent with law." 47 U.S.C. §§ 154(i), 303(r); *see generally Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 384-85 (1992).

4. The Third Circuit's ruling that Section 202 authorizes any action, no matter how re-regulatory and restrictive, is thus in significant tension with the decisions of the D.C. Circuit that recognized and gave force to Section 202's deregulatory thrust. *See Sinclair*, 284 F.3d at 159; *Fox*, 280 F.3d at 1044. This tension creates uncertainty for owners of media entities, and could lead to arbitrary results. Challenges to the FCC's application of its media ownership rules in the context of specific mergers must be appealed to the D.C. Circuit. *See* 47 U.S.C. § 402. Given that court's different interpretation of statutory intent and meaning, the result of such challenges would be very much in doubt.

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[7] The word "modify" appears repeatedly in Section 202, and in each instance it authorizes easing or lifting the Commission's media ownership restrictions. *See* 1996 Act § 202(a)-(c).

Even more to the point, the Third Circuit's ruling is indefensible. As the Third Circuit would have it, Congress – despite the 1996's Act reform of the media ownership system – gave the Commission *carte blanche* to restore pre-1996 restrictions, or to impose even more restrictive rules, after waiting only a few years. Indeed, under the Third Circuit's approach the Commission could restore the national radio ownership cap that Congress eliminated in Section 202(a). 1996 Act § 202(a). Turning back the clock in that fashion simply cannot be what was anticipated by the Congress that saw competition as such a powerful reason for deregulation.[8]

Thus, the Third Circuit's interpretation of Section 202(h) – which the Commission must apply in the future to all of its media ownership rules – renders that provision a dead letter. As a matter of basic administrative law, the Commission is required to "carefully monitor the effects of its regulations and make adjustments where the circumstances so require." *ACLU v. FCC*, 823 F.2d 1554, 1565 (D.C. Cir. 1987); *see also, e.g., HBO, Inc. v. FCC*, 567 F.2d 9, 36 (D.C. Cir. 1977). The Third Circuit's reading of Section 202(h) simply duplicates this background requirement, and turns into a nullity a statute that Congress intended to serve an important deregulatory purpose. Such a reading is not sustainable. *See Connecticut Nat'l Bank v. Germain*, 503 U.S. 249, 253 (1992); *Hohn v. United States*, 524 U.S. 236, 249 (1998).

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[8] To be sure, Congress did not set the contour approach in stone. If the FCC can devise a new definitional approach that is superior to the contour approach and does not tighten ownership restrictions, Section 202 does not bar it from doing so. The FCC may not, however, restrict local radio ownership by the device of simply revising the market definitions on which the tiers in the 1996 Act were based.

III. The "Top-4" Restriction On Local Television Ownership Upheld By The Third Circuit Likewise Violates Section 202 Of The 1996 Act.

The Third Circuit also contravened Section 202(h) in affirming the Commission's decision to retain the top-4 restriction on ownership of local television stations.

The Commission acknowledged that the competitive position of many local television stations, particularly in small and mid-size markets, has deteriorated substantially since 1996. Competition from cable and direct broadcast satellite has resulted in audience fragmentation and pressure on advertising revenues. *Order* ¶¶ 124-125, 143 & n.285 (Pet. App. 285a-287a, 298a-299a). Local broadcasters also must contend with the substantial costs of complying with Congress's mandate to transition to digital television, *id.* ¶ 148 (Pet. App. 301a-302a), and steep declines in the amount that the networks pay local stations to carry network programming, *id.* ¶ 168 (Pet. App. 320a). These forces have a devastating impact on broadcaster profitability. In smaller markets, many stations (especially lower-rated ones) are losing money, and even the higher-ranked stations suffer from declining profits. As the Commission concluded, "the ability of local stations to compete successfully in the delivered video market is meaningfully (and negatively) affected in mid-sized and smaller markets," and "owners of television stations in small and mid-sized markets are experiencing greater competitive difficulty than stations in larger markets." *Id.* ¶ 201 (crediting Theresa J. Ottina, *The Declining Financial Position of Television Stations in Medium and Small Markets* 5-9 (Dec. 2002)) (Pet. App. 343a-344a).

The Commission also acknowledged that the limited deregulation enacted in 1999 enabled individual weak stations to become strong combined competitors, and that local television broadcasters and viewers would see

substantial benefits from an increase in such combinations. *Id.* ¶¶ 147-168 (Pet. App. 300a-320a). Specifically, the Commission found that "common ownership of broadcast television stations in a local market can facilitate efficiencies and cost savings," which "should be available to stations in a larger number of [areas] than permitted by our current rule." *Id.* ¶ 147 (Pet. App. 300a-301a). The Commission found that the current rules unfairly penalized local broadcasters, particularly those in small and medium-sized markets, "restrict[ing] many broadcasters to suboptimal size and, therefore, hinder[ing] their ability to compete with other media for advertising revenue." *Id.* ¶ 151 (Pet. App. 303a). The Commission also concluded that common ownership generally "improved audience ratings," and that viewers generally "prefer the post-merger programming." *Id.* ¶ 150 (Pet. App. 302a-303a); *see also id.* ¶¶ 164, 168-169 (Pet. App. 316a, 320a).

The Third Circuit endorsed these conclusions, specifically noting the "localism benefits" associated with common ownership. Pet. App. 72a. Yet the Third Circuit upheld the FCC's imposition of a top-4 restriction that blocks mergers precisely where the need for common ownership is greatest: in small and mid-size markets. Indeed, the FCC's rule allows no combinations at all in 81 of the smallest 150 television markets, and only one combination in 35 more. Thus, in 77% of the markets most in need of the advantages that the FCC found to flow from common ownership, the top-4 rule prevents local stations from realizing those advantages.

The Commission thus acted without regard to the competitive viability of local television stations and the ultimate effect on viewers and broadcasters. The FCC's *Order* thwarts the substantial public interest benefits that common ownership allows and that Congress sought to achieve in Section 202. The *Order* therefore cannot be

reconciled with Section 202(h), which obliges the FCC to reevaluate the need for its ownership rules in light of competitive conditions with a view toward deregulation, and requires more than mere speculation to justify continued regulatory burdens.

In upholding the Commission's flawed rule, the Third Circuit relied, without significant analysis, on the supposed "general separation" between the market shares of the top-4 stations and the rest of the stations in a given market. Pet. App. 75a-76a; *Order* ¶ 195 (Pet. App. 337a-338a). Even if such a gap existed, however, it is not clear why that would matter: the Commission pointed to no evidence that the public interest benefits of co-ownership would be diminished if there were combinations among stations with closely matched viewing shares. Given Congress's directive in Section 202(h), evidence about actual harm to the competitive marketplace is required to justify retention of an ownership rule.

In any event, the "general separation" principle grossly oversimplifies variations among markets. Indeed, top-4 status masks critical differences among stations and is a patently inadequate proxy for whether a given merger will produce the public interest benefits acknowledged and endorsed in the *Order*.

The Third Circuit also asserted that the Commission's numerical limits on local station consolidation "already allowed, in effect, extra concentration to ensure that small-market stations would realize the efficiency benefits of consolidation," and that the Commission reasonably concluded that any consolidation in the smallest markets with fewer than five stations would give rise to "concentrated market power" that "outweighed the efficiency benefits" of common ownership. Pet. App. 73a-74a. This rationale is faulty on the same ground; it treats top-4 stations as a monolith, and fails to come to grips with the differences

between various markets and the reality of the competitive conditions that smaller-market stations face.

In short, in reviewing the top-4 rule the Third Circuit did not apply the deregulatory presumption embodied in Section 202, and thus affirmed an order full of speculation and lacking any showing of real competitive harm. This is in clear contrast to the D.C. Circuit's approach. In *Sinclair Broadcast Group, Inc. v. FCC*, 284 F.3d 148 (D.C. Cir. 2002), the D.C. Circuit did apply that presumption, gave the Commission's local television rules a searching examination, and remanded them for further action by the Commission – the very action that the Third Circuit ultimately reviewed in the case at hand. *See id.* at 159. Indeed, *Sinclair* remanded the rules because, in essence, they did not deregulate *enough* – the Commission failed to take full account of the competitive effect of cable television when determining whether "any of such rules are necessary in the public interest as a result of competition." 1996 Act § 202(h); *see Sinclair*, 284 F.3d at 162-64. This approach was not carried through in the Third Circuit's review of the Commission's further work on this issue, although that work was deeply flawed in similar ways; based on its misinterpretation of Section 202, the Third Circuit took a far more lax and permissive approach.

Thus, the top-4 restriction upheld by the Third Circuit contravenes Congress's intent as clearly expressed in Section 202 and will do grave harm to local stations. For these reasons, the Third Circuit's ruling on the Commission's local television rules warrants this Court's review. *See Turner*, 520 U.S. at 189-90.

CONCLUSION

The petition for a writ of certiorari should be granted.[9]

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[9] Other parties have petitioned for review of the Third Circuit's decision, raising issues regarding the interpretation of Section 202 similar to those raised here (including issues involving the restrictions on newspaper/broadcast cross-ownership), and also challenging the Third Circuit's refusal to transfer the case to the D.C. Circuit. Petitioner agrees that these issues merit this Court's attention. Moreover, because these arguments are fully applicable to petitioner's position, if the Court grants one of those petitions, it should also grant review here. In particular, it would make little sense to hear a challenge involving interpretation of Section 202(h) of the 1996 Act without also considering the implications of the proper construction of that statute for the local radio and local television rules. In the alternative, petitioner respectfully requests that the Court hold the instant petition pending disposition of those other petitions.

APPENDIX

Appendix A

Statutory Provisions Involved

Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56

SEC. 202. BROADCAST OWNERSHIP.

(a) NATIONAL RADIO STATION OWNERSHIP RULE CHANGES REQUIRED.--The Commission shall modify section 73.3555 of its regulations (47 C.F.R. § 73.3555) by eliminating any provisions limiting the number of AM or FM broadcast stations which may be owned or controlled by one entity nationally.

(b) LOCAL RADIO DIVERSITY.--

(1) APPLICABLE CAPS.--The Commission shall revise section 73.3555(a) of its regulations (47 C.F.R. § 73.3555) to provide that--

(A) in a radio market with 45 or more commercial radio stations, a party may own, operate, or control up to 8 commercial radio stations, not more than 5 of which are in the same service (AM or FM);

(B) in a radio market with between 30 and 44 (inclusive) commercial radio stations, a party may own, operate, or control up to 7 commercial radio stations, not more than 4 of which are in the same service (AM or FM);

(C) in a radio market with between 15 and 29 (inclusive) commercial radio stations, a party may own, operate, or control up to 6 commercial radio stations, not

more than 4 of which are in the same service (AM or FM); and

(D) in a radio market with 14 or fewer commercial radio stations, a party may own, operate, or control up to 5 commercial radio stations, not more than 3 of which are in the same service (AM or FM), except that a party may not own, operate, or control more than 50 percent of the stations in such market.

(2) EXCEPTION.--Notwithstanding any limitation authorized by this subsection, the Commission may permit a person or entity to own, operate, or control, or have a cognizable interest in, radio broadcast stations if the Commission determines that such ownership, operation, control, or interest will result in an increase in the number of radio broadcast stations in operation.

(c) TELEVISION OWNERSHIP LIMITATIONS.--

(1) NATIONAL OWNERSHIP LIMITATIONS.--The Commission shall modify its rules for multiple ownership set forth in section 73.3555 of its regulations (47 C.F.R. § 73.3555)--

(A) by eliminating the restrictions on the number of television stations that a person or entity may directly or indirectly own, operate, or control, or have a cognizable interest in, nationwide; and

(B) by increasing the national audience reach limitation for television stations to 35 percent.

(2) LOCAL OWNERSHIP LIMITATIONS.--The Commission shall conduct a rulemaking proceeding to

determine whether to retain, modify, or eliminate its limitations on the number of television stations that a person or entity may own, operate, or control, or have a cognizable interest in, within the same television market.

(d) RELAXATION OF ONE-TO-A-MARKET.--With respect to its enforcement of its one-to-a-market ownership rules under section 73.3555 of its regulations, the Commission shall extend its waiver policy to any of the top 50 markets, consistent with the public interest, convenience, and necessity.

(e) DUAL NETWORK CHANGES.--The Commission shall revise section 73.658(g) of its regulations (47 C.F.R. § 658(g)) to permit a television broadcast station to affiliate with a person or entity that maintains 2 or more networks of television broadcast stations unless such dual or multiple networks are composed of--

(1) two or more persons or entities that, on the date of enactment of the Telecommunications Act of 1996, are "networks" as defined in section 73.3613(a)(1) of the Commission's regulations (47 C.F.R. § 73.3613(a)(1)); or

(2) any network described in paragraph (1) and an English-language program distribution service that, on such date, provides 4 or more hours of programming per week on a national basis pursuant to network affiliation arrangements with local television broadcast stations in markets reaching more than 75 percent of television homes (as measured by a national ratings service).

(f) CABLE CROSS OWNERSHIP.--

(1) ELIMINATION OF RESTRICTIONS.--The Commission shall revise section 76.501 of its regulations (47 C.F.R. § 76.501) to permit a person or entity to own or control a network of broadcast stations and a cable system.

(2) SAFEGUARDS AGAINST DISCRIMINATION.--The Commission shall revise such regulations if necessary to ensure carriage, channel positioning, and nondiscriminatory treatment of nonaffiliated broadcast stations by a cable system described in paragraph (1).

(g) LOCAL MARKETING AGREEMENTS.--Nothing in this section shall be construed to prohibit the origination, continuation, or renewal of any television local marketing agreement that is in compliance with the regulations of the Commission.

(h) FURTHER COMMISSION REVIEW.--The Commission shall review its rules adopted pursuant to this section and all of its ownership rules biennially as part of its regulatory reform review under section 11 of the Communications Act of 1934 and shall determine whether any of such rules are necessary in the public interest as the result of competition. The Commission shall repeal or modify any regulation it determines to be no longer in the public interest.

(i) ELIMINATION OF STATUTORY RESTRICTION.--Section 613(a) (47 U.S.C. § 533(a)) is amended--

(1) by striking paragraph (1);

(2) by redesignating paragraph (2) as subsection (a);

(3) by redesignating subparagraphs (A) and (B) as paragraphs (1) and (2), respectively;

(4) by striking "and" at the end of paragraph (1) (as so redesignated);

(5) by striking the period at the end of paragraph (2) (as so redesignated) and inserting "; and"; and

(6) by adding at the end the following new paragraph:
"(3) shall not apply the requirements of this subsection to any cable operator in any franchise area in which a cable operator is subject to effective competition as determined under section 623(1).".